

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOMBARDIER, INC.,

Plaintiff,

v.

MITSUBISHI AIRCRAFT CORPORATION,
MITSUBISHI AIRCRAFT CORPORATION
AMERICA INC., AEROSPACE TESTING
ENGINEERING & CERTIFICATION INC.,
MICHEL KORWIN-SZYMANOWSKI,
LAURUS BASSON, MARC-ANTOINE
DELARCHE, CINDY DORNÉVAL, KEITH
AYRE, AND JOHN AND/OR JANE DOES 1-
88,

Defendants.

NO. 2:18-cv-01543-JLR

**DEFENDANTS KEITH AYRE AND
MARC-ANTOINE DELARCHE'S
SURREPLY MOTION TO STRIKE**

NOTED ON MOTION CALENDAR:
May 17, 2019

1 With its Reply in support of its Updated Preliminary Injunction Motion against
 2 Defendants Keith Ayre and Marc-Antoine Delarche, Plaintiff Bombardier Inc. filed four
 3 declarations and a total of thirteen exhibits, to which Mr. Ayre and Mr. Delarche have no
 4 opportunity to respond. We move to strike this evidence not submitted until reply.

5 In *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 308 F. Supp. 2d 1208 (W.D. Wash.
 6 2003), *aff'd*, 372 F.3d 1330 (Fed. Cir. 2004), the defendant moved to strike a declaration with
 7 new evidence that the plaintiff submitted with its Reply in support of a motion for preliminary
 8 injunction. *Id.* 1214. The district court granted the motion because “[t]he declaration at issue
 9 contain[ed] new evidence... to which Defendant is not able to respond within the briefing
 10 schedule.” *Id.* The court in *Nautilus* cited and followed the rule in *Provenz v. Miller*, 102 F.3d
 11 1478 (9th Cir. 1996), in which the Ninth Circuit held that a district court erred by denying a
 12 motion to strike new evidence submitted on reply. *Id.* at 1483.

13 The following describes Bombardier’s new evidence and why it should be stricken.

14 *Declaration of John Whitaker (ECF No. 193).* This declaration purports to summarize a
 15 telephone call between Mr. Whitaker, counsel for Bombardier, and Jacob Freeman, counsel for
 16 Defendants Ayre and Delarche. Because counsel for Defendants are not afforded an
 17 opportunity to correct the declaration’s mischaracterizations of that call and of Defendants’
 18 position regarding the Stipulated Protective Order, the Whitaker Declaration should be stricken.

19 *Declaration of Boris Meislitzer (ECF No. 194).* This declaration is apparently intended
 20 to cast doubt on Mr. Ayre’s testimony that he sent the email contained in Exhibit C to the
 21 Declaration of Jerry Riedinger (ECF No. 166) to prepare for an exit meeting he had at
 22 Bombardier on his last day. (*See* Ayre Decl. [ECF Nos. 186, 188] ¶ 49.) Bombardier had
 23 originally alleged (falsely) that Mr. Ayre sent this email to a MITAC employee. (FAC [ECF
 24 No. 143] ¶ 79.) Bombardier has abandoned this allegation (Reply [ECF No. 192] at 3 n.1), and
 25 it may not now, on reply, create a new story about this email which Mr. Ayre will not have the
 26 chance to rebut. The Meislitzer Declaration should be stricken.

1 *Declaration of Jeffrey Danley (ECF No. 196).* The Danley declaration attaches twelve
 2 exhibits, seven of which apparently are emails sent from Mr. Ayre's Bombardier email address
 3 to his personal email address on August 24, 2016. (Danely Decl. Exs. A, E–H, K & L.) Six of
 4 the seven emails are so heavily redacted that they have no substance, and should be stricken for
 5 this reason alone. Danley Exhibit A is already in the record. (FAC Ex. S, at 7–8.) Danley
 6 Exhibit G, which is almost entirely redacted, appears based on its “sent” time to be the same
 7 email MITAC submitted in unredacted form as Exhibit C to the Riedinger Declaration.
 8 Exhibit G was referred to in Bombardier's FAC (§ 79) and in its Updated Preliminary
 9 Injunction Motion (ECF No. 146, at 6:12–13), but Bombardier chose not to include it as an
 10 exhibit to either pleading. The redacted emails in Danley Exhibits E, F, H, K, and L are in the
 11 record for the first time on reply, and have all been in Bombardier's possession since before the
 12 commencement of the case. Of these seven emails, only one, Exhibit E, is even arguably in
 13 rebuttal to new material in Defendants' Opposition to the Updated Preliminary Injunction
 14 Motion (ECF Nos. 185, 187). Danley Exhibits K and L are not even referred to in
 15 Bombardier's Reply. Danley Exhibits A, E–H, K & L should be stricken.

16 Danley Exhibit B is a heavily redacted screenshot of a search page from the FAA's
 17 website. Because the document is so redacted, it cannot support the proposition Bombardier
 18 cites it for. (*See* Reply at 3:12–15.) Moreover, there is no opportunity to respond to it, even
 19 were we able to figure out what it says. Danley Exhibit B should therefore be stricken.

20 Danley Exhibit C is apparently the LinkedIn page for Frederic Contenot, the person
 21 who Bombardier states it had wrongly assumed was the recipient of the email in Riedinger
 22 Exhibit C. (Reply at 3 n.1.) Bombardier submits this email to excuse itself for making the
 23 false allegation that Mr. Ayre sent that email to a MITAC employee. The exhibit does not
 24 rebut anything in Defendants' Opposition. Danley Exhibit C should be stricken.

25 Danley Exhibit D is email correspondence between counsel for MITAC and counsel for
 26 Bombardier concerning Riedinger Exhibit C. Bombardier uses this email to support its
 27 accusation that Defendants Ayre and Delarche misled the Court by not stating in the Opposition

1 that Bombardier's counsel had asked *MITAC's counsel* to treat the email as if it had been
 2 designated "Attorneys Eyes Only." (Reply at 4:5–7.) Counsel for Defendants Ayre and
 3 Delarche are not copied on the email in Danley Exhibit D and were not aware of its substance
 4 on May 13, 2019, when the Opposition was filed. Danley Exhibit D should be stricken.

5 Danley Exhibits I and J are what purport to be logs of emails Mr. Ayre and Mr.
 6 Delarche respectively sent from their Bombardier email accounts to their personal email
 7 accounts. Bombardier uses these exhibits to argue that emailing work documents to personal
 8 email accounts was not these Defendants' normal practice. (Reply at 6.) This argument was
 9 available to Bombardier when it filed its Updated Motion, and Bombardier should not be
 10 allowed to make it now, when Defendants do not have an opportunity to respond. Danley
 11 Exhibits I and J should be stricken.

12 *Declaration of Michael Borfitz (ECF No. 197).* Mr. Borfitz states that he

13 was asked to give [his] opinion, based on [his] technical and
 14 practical experience, about a) the relationship between Mr. Ayre's
 15 emails and the Scope of Work... Mr. Ayre outlined for himself for
 16 his new role at [MITAC] in July 2016, as he prepared to leave
 Bombardier... , and b) the nature of the commercial value the
 substance of Mr. Ayre's emails would have for a competitor of
 Bombardier's in the aerospace industry.

17 (Borfitz Decl. ¶ 7.) Mr. Borfitz goes on to discuss six emails attached as exhibits to the Danley
 18 Declaration. (Danley Decl. Exs. A, F, G, H, K & L.) The Borfitz Declaration is heavily
 19 redacted, rendering it almost impossible to respond to, even if Mr. Ayre had the opportunity,
 20 which he does not. The arguments in the Borfitz Declaration were available to Bombardier
 21 when it filed its Updated Motion, and Bombardier should not be permitted to make them now,
 22 when Mr. Ayre does not have an opportunity to respond. Moreover, the Borfitz Declaration
 23 has almost nothing to do with the Opposition, or even the Reply. The Reply cites only two of
 24 its paragraphs, one of which concerns Danley Exhibit H, which is new on reply. (Reply at 6:2.)
 25 The Reply also cites the declaration's paragraph 12 for a proposition that paragraph in no way
 26 supports. (See Reply at 3:5–6.) The Borfitz Declaration should be stricken.

1 DATED: May 22, 2019.

2 **SAVITT BRUCE & WILLEY LLP**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2019 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 22nd day of May, 2019 at Seattle, Washington.


Gabriella Sanders